Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

HAROLD J. SWIFT,

Petitioner,

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Whether a heightened pleading standard still applies to permit dismissal of a 42 U.S.C. § 1983 action against a government official in his individual capacity, prior to any discovery and despite fair notice of the claim.

PARTIES TO THE PROCEEDING

Petitioner

Harold J. Swift

Respondents

Texas Department of Criminal Justice,
Institutional Division

State of Texas

James A. Lynaugh,
Executive Director of the Texas Department of
Criminal Justice

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

HAROLD J. SWIFT,

Petitioner,

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED SATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Harold J. Swift, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

Opinions Below

The order of dismissal of the United States District Court for the Southern District of Texas -- Galveston Division and the judgment of the United States Court of Appeals for the Fifth Circuit are not reported and are reproduced in the Appendix at App. 1 - 3.

Jurisdiction

The Fifth Circuit's final judgment was rendered on December 19, 1995. This Court has jurisdiction to review the court of appeals' final judgment under 28 U.S.C. § 1254.[1]

Constitutional Provisions And Statutes Involved

This case concerns the premature dismissal of an action brought against a government official in his individual capacity under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

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[1] An almost identical question has been raised in a pending petition for certiorari. *See Reyes v. Lugo*, Docket No. 95-1041, 64 U.S.L.W. 3521 (Feb. 6, 1996) (petition filed December 27, 1995).

> action at law, suit in equity, or other proper proceeding for redress.

This case also concerns the pleading requirements of FED.R.CIV.P. 8(a), which provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Statement Of The Case

Before an opportunity to conduct meaningful discovery and despite fair notice of like claim, the district court dismissed Harold J. Swift's Section 1983 action against a government official in his individual capacity solely because of a so-called heightened pleading requirement that this Court had earlier rejected in Section 1983 actions against municipalities. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The facts of this case are clear cut and easily reviewable.

1. On May 3, 1992, Harold J. Swift suffered a ruptured abdominal aortic aneurysm that damaged his spinal cord and left him confined to a wheelchair for the rest of his

life. Mr. Swift's complaint alleged that his injuries were the direct result of the deliberately indifferent policies of prison officials who afforded him inadequate medical care.[2]

2. Mr. Swift alleged that on the morning of May 1, 1992, while he was confined in the Jester III unit in Richmond, Texas, he began to experience stomach pains. Following prison policy, he requested medical treatment at the Ramsey I unit infirmary. Rather than being provided medical treatment as requested, Mr. Swift was returned to his cell. On May 3, 1992, at approximately 7:00 a.m., Mr. Swift's pain worsened. He again requested treatment at the infirmary, but he was again returned to his cell. By 7:30 a.m., Mr. Swift's pain was so severe that he was taken from his cell on a stretcher. He remained in the prison infirmary all day without adequate treatment until he was near death.

3. On May 3, 1992, at 5:00 p.m., two days after he first notified prison officials of his illness, Mr. Swift was finally taken to Jon Sealy Hospital in Galveston, Texas, where he received the medical treatment which had been denied him by the prison officials. This medical treatment came too late. As a direct result of the deliberate indifference of prison officials, Mr. Swift is now confined to a wheelchair for the remainder of his life.

4. On May 3, 1993, Mr. Swift filed a Section 1983 complaint against the State of Texas, the Texas Department of Criminal Justice, Institutional Division, and James A. Lynaugh, Executive Director of the Texas Department of Criminal

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[2] Mr. Swift's complaint is reproduced in the Appendix, at App. 4 - 10.

Justice, in his official and individual capacities. Mr. Swift alleged, in part, that his injuries were caused by the deliberately indifferent policies of Mr. Lynaugh, which resulted in a denial of basic medical care.[3]

5. The defendants answered this complaint on July 27, 1993. The State and the Department asserted Eleventh Amendment and sovereign immunity defenses while Mr. Lynaugh asserted a qualified immunity defense.

6. On September 16, 1993, the defendants moved to dismiss Mr. Swift's complaint based on lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.[4] On October 6, 1993, Mr. Swift timely responded to the motions to dismiss.

7. On November 4, 1993, the magistrate entered a report and recommendation to dismiss all claims alleged by Mr. Swift. Specifically, the report recommended dismissal of Mr. Swift's Section 1983 individual capacity claims against Mr. Lynaugh based upon failure to state a claim upon which relief can be granted. App. 13. On November 14, 1993, Mr. Swift filed his objections to magistrate's report and recommendations, which objections were limited to his claims against Mr. Lynaugh in his individual capacity.

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[3] The denial of basic medical care to a prisoner violates the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

[4] Two weeks before the motions to dismiss were filed, the district court ordered limited discovery on the immunity issues. However, the case was dismissed on the pleadings before such discovery could occur. *See* Magistrate's Order, App. 11.

8. The district court adopted the magistrate's recommendations and entered final judgment of dismissal of the complaint on November 22, 1994. The Fifth Circuit affirmed the district court's dismissal without an opinion on December 19, 1995. This petition followed.

Reasons For Granting The Writ

A little over two years ago, this Court rejected the sort of judge-made heightened pleading requirement that the courts below applied to dismiss Mr. Swift's claims on the pleadings. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). Although that case was limited on its facts to Section 1983 claims against municipalities, the *Leatherman* rationale was too strong to be ignored by courts and litigants. This Court reasoned that a judge-made heightened pleading standard is "impossible to square" with the liberal notice pleading standard provided by the federal rules. *Id.* at 168; *see also* FED.R.CIV.P. 8(a).

The present case is important because the courts of appeals *have ignored* the *Leatherman* rationale in Section 1983 actions brought against goverment officials in their individual capacities. Throughout the country -- despite the liberal pleading rules, despite the rationale of *Leatherman*, and without discovery -- the courts of appeals continue to adhere to a heightened pleading standard to dismiss valid claims.

The message in *Leatherman* was simple and direct. A plaintiff should not be required to plead detailed facts unless those facts "are known to the plaintiff and are not peculiarly within the knowledge of the defendants." *See Schultea v. Wood*, 47 F.3d 1427, 1432 (5th Cir. 1995) (en banc) (explaining Justice Scalia's opinion in *Anderson v. Creighton*, 483 U.S.

635, 646 n. 6 (1987)). This message has particular significance in individual capacity Section 1983 actions, since such actions involve the policies and procedures of the government official -- facts that may not be known at the time of suit by the plaintiff but that which are peculiarly within the knowledge of the government official.

And the *Leatherman* rule makes good sense. A plaintiff should not be required to plead detailed facts concerning a goverment official's liability before that plaintiff has had an opportunity to discover the facts supporting liability. In light of Rule 8's liberal notice pleading requirements, courts should not dismiss on the pleadings for failure to state a claim, but "must rely on summary judgment and control of discovery to weed out unmeritorious claims...." *Id.* at 168-169.

Although the message in *Leatherman* was simple and direct, lower courts have not gotten the message. This case presents this Court with a significant opportunity to correct the apparent conflict among the courts of appeals and between the courts of appeals and this Court's reasoning in *Leatherman*, and also to provide further guidance to the lower courts concerning federal pleading requirements.

I. The Fifth Circuit's Heightened Pleading Standard For Individual Capacity Section 1983 Actions Conflicts With This Court's Reasoning In *Leatherman*

In this case, the Fifth Circuit affirmed a dismissal of an individual capacity Section 1983 action based solely upon a judge-made heightened pleading standard. App. 2. Before discovery, the district court dismissed the claim for failure to state a claim upon which relief could be granted. App. 1.

In 1993, this Court unanimously rejected such a judge-made heightened pleading requirement in Section 1983 actions brought against municipalities. *Leatherman*, 507 U.S. at 164. The Court rejected the contention that a heightened pleading standard was required to protect the governmental entity's immunity. *Id.* at 166. This Court held that a heightened pleading standard was contrary to the federal rules which require only a "short and plain statement of the claim...." *Id.* at 168; FED.R.CIV.P. 8(a). This Court reversed a dismissal, as here, based solely upon a heightened pleading standard. *Id.* at 164.

Nonetheless, as is demonstrated in this case, the Fifth Circuit continues to embrace the judge-made heightened pleading requirements in Section 1983 actions. In doing so, the Fifth Circuit has ignored this Court's unanimous reasoning in *Leatherman* and has instead held that *Leatherman* is limited to Section 1983 actions against municipalities. *See Schultea v. Wood*, 47 F.3d at 1429-30. Thus, the Fifth Circuit continues to dismiss cases based upon the same heightened pleading requirement that this Court criticized in *Leatherman*.

The Fifth Circuit is not alone in this determination. *See e.g. Branch v. Tunnell*, 14 F.3d 449, 451 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994) (prior decisions requiring heightened pleading standard in qualified immunity cases followed because *Leatherman* court expressly stated it was not deciding whether federal courts may employ heightened pleading standard in such cases); *Kimberlin v. Quinlan*, 6 F.3d 789, 794-795 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated on other grounds*, 115 S.Ct. 2552 (1995) (because *Leatherman* did not address heightened pleading in individual capacity suits, precedent requiring that standard remains law of circuit); *Verney v. Pennsylvania Turnpike*

Comm'n, 881 F.Supp. 145, 150 n.5 (E.D. Pa. 1995) (noting conflicting decisions within Eastern District of Pennsylvania on whether heightened pleading standard applies in any civil rights actions, including suits against individual governmental officials).

One commentator has noted that despite the clear rationale of *Leatherman*, the courts of appeals have shown a remarkable "tenacity" in adhering to the heightened pleading standard and in "refusing to extend the rationale of the decision beyond its facts." *See* Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U.L. REV. 59, 62 (1994).

Such tenacity, in this context, is not admirable. This Court in *Leatherman* provided a clear analytical framework for resolution of pleading challenges. That analytical framework comports with the federal rules and with the proper standard of review.[5] To ignore that analytical framework and to tenaciously cling to a judge-made rule that is without logical foundation is better described as intransigence.

The confusion among the Circuits concerning whether a heightened pleading standard has any remaining vitality in Section 1983 actions is apparent. It has been recognized that the rationale in *Leatherman* "casts doubt on the validity of *any* judge-made 'heightened pleading' standard imposed in *any* context." *Kimberlin v. Quinlan*, 6 F.3d at 799 n.5 (Edwards, J. dissenting). Moreover, the Seventh Circuit, contrary to the

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[5] As has been long established, a pleading should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Fifth Circuit, has rejected heightened pleading requirements. *See Triad Assoc., Inc. v. Robinson*, 10 F.3d 492, 497 (7th Cir. 1993). As Judge Posner of that court stated recently: "a nascent movement in the lower courts to add judge-made exceptions to those listed in Rule 9(b)...was scotched by the Supreme Court in *Leatherman.*" *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994).

Because of the confusion among the Circuits over the remaining vitality of the so-called heightened pleading standard after *Leatherman* and the national importance of this issue to all Section 1983 litigants, this Court should grant this petition.

II. Mr. Swift Satisfied The Fair Notice Pleading Standards of Rule 8(a)

This is an appropriate case for review of the continuing heightened pleading quandary because Harold J. Swift's complaint, on its face, satisfied the fair notice pleading standards of Rule 8(a). *See* FED.R.CIV.P. 8(a). That complaint is reproduced in the Appendix, at App. 4 - 10.

In this context, this Court has held that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The prisoner must allege acts or omissions sufficiently harmful to demonstrate deliberate indifference to serious medical needs. *Id.* at 106.

Here, Mr. Swift alleged such "sufficiently harmful" acts or omissions. Mr. Swift alleged that dispute his repeated complaints of serious illness, he was denied basic medical care by prison officials for two days and then, after being brought to the infirmary in intense pain, he was left untreated for over nine

hours before any treatment was provided. This denial of basic medical care, Mr. Swift alleged, resulted from a policy of deliberate indifference by prison officials and resulted in a ruptured abdominal aortic aneurysm that left him confined to a wheelchair for life. *See* App. 4 - 10.[6] Mr. Swift properly alleged the violation of the Eight Amendment as the basis for his Section 1983 action. *See Estelle*, 429 U.S. at 102.

Thus, Mr. Swift's complaint provided "a short and plain statement of the claim showing the pleader is entitled to relief," as required by FED.R.CIV.P. 8(a). Since the complaint satisfied the notice pleading requirements, the complaint should not have been dismissed on the pleadings under FED.R.CIV.P. 12(b)(6). Instead, the lower court should have awaited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed. *See Leatherman*, 507 U.S. at 168-169.

Because, as here, the lower courts continue to apply a heightened pleading requirement that is contrary to federal pleading rules and this Court's rationale in *Leatherman*, this Court should grant this petition to provide clear guidance to the lower courts on this question.

Conclusion

The petition should be granted and upon review, this Court should issue writ to reverse the lower court's order of dismissal and remand for further proceedings. In the

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[6] In his answer and motion to dismiss, Mr. Lynaugh did not allege that the defendants provided any medical treatment to Mr. Swift. Rather, Mr. Lynaugh contended that Mr. Swift's complaint sounded in negligence -- despite the fact that Mr. Swift never alleged negligent treatment.

alternative, the petition should be granted and the decision below summarily reversed and remanded to the Fifth Circuit for reconsideration in light of this Court's rationale in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

Respectfully submitted,

Harold J. Swift, Petitioner

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL NO. G-93-220
	§	
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE -	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

FINAL JUDGMENT

Pursuant to this Court's Order of Dismissal, entered on even date herewith, it is the judgment of this Court that this cause be, and it is hereby, **DISMISSED**, with prejudice, in its entirety.

THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this _____ day of _____ _____, 1994.

_____

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60859
Conference Calendar

HAROLD SWIFT,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL.,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-G-93-220

- - - - - - - - - - - - - - - - - -

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5.1 provides: "The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant appeals from the district court's order dismissing his civil rights complaint brought pursuant to 42 U.S.C. § 1983. He argues that he was denied adequate medical treatment due to the policies implemented and enforced by appellee, Lynaugh. We have reviewed the record, the magistrate judge's report and recommendation, and the district court's order, and find no reversible error. Accordingly, we affirm for essentially the reasons given by the district court. Swift v. Texas Dep't of Criminal Justice, Institutional Division et al., No. CA-G-93-220 (S.D. Tex. Nov. 22, 1994).

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	
	§	
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; STATE OF TEXAS; JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE	§	CIVIL ACTION NO. ___

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW HAROLD J. SWIFT ("Plaintiff" or "Swift") and files this Original Complaint pursuant to 42 U.S.C.A. § 1983 against the TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; THE STATE OF TEXAS; and JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE (collectively referred to as "Defendants"), and for cause of action would show this Court as follows:

I.

PARTIES

1.1 HAROLD J. SWIFT, Plaintiff, is a resident of Texas under the care and custody of Defendants. Swift is currently confined at the Jester III unit in Richmond, Texas.

1.2 THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE may be served with citation and process in this matter by delivery of a copy of this petition and citation to the Texas Department of Criminal Justice, P.O. Box 99, Huntsville, Texas 77342-0099 or at 815 Eleventh Street, Huntsville, Texas 77340.

1.3 THE STATE OF TEXAS may be served by service of a copy of this petition and citation upon Attorney General Dan Morales at P.O. Box 12548, Austin, Texas 78711.

1.4 Defendant JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, may be served by service of a copy of this petition to James A. Lynaugh, Executive Director, Texas Department of Criminal Justice, P.O. Box 99, Huntsville, Texas 77342-0099.

II.

JURISDICTION AND VENUE

2.1 Your Plaintiff would show that venue and jurisdiction in this Court is proper under the laws and

constitution of the United States, including 28 U.S.C. § 1343 and 28 U.S.C. § 1391(b).

III.

DEFENDANTS' LIABILITY

3.1 When Plaintiff Swift alleges herein that Defendants did or failed to do any act or omission leading to liability to Plaintiff, it is intended to allege that Defendants, acting through their employees, agents, and/or servants, under the policies, regulations, customs, and usages established and implemented by Defendants, caused harm and violated the rights, privileges, or immunities secured by the Constitution and laws of the United States.

IV.

BASIS FOR LIABILITY

4.1 Defendants TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; THE STATE OF TEXAS; and JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, were entrusted with the care and custody of Plaintiff Swift while he was incarcerated in the Texas Department of Corrections. On or about May 1, 1992, while incarcerated at Ramsey I Unit in Rosharon, Texas, Plaintiff Swift began experiencing severe stomach and back pains. Pursuant to the rules and regulations of Defendants, Plaintiff Swift presented for medical care to the infirmary at Ramsey I Unit on May 2, 1992 at 7:30 a.m. and requested treatment for his urgent medical needs. However, despite the

urgent right to necessary medical care which every incarcerated person is entitled to under the rights, privileges, and immunities secured by the Constitution and laws of the United States, Plaintiff Swift was returned to his cell by the employees at Ramsey I Unit operating under the regulations, customs, and usages laid down by Defendants. The sum effect of these regulations, customs, and usages is to deny necessary medical care to inmates such as Swift, and the continuing practice of Defendants is to be deliberately indifferent to this continuing denial of necessary medical care.

4.2 The failure to render necessary and critical medical care, including reasonable examination and care for his extremely urgent condition, was under the color of the regulations, customs, procedures and practices of the State of Texas and the Texas Department of Criminal Justice, intentional and deliberately established by Defendant James A. Lynaugh as Executive Director of the Texas Department of Criminal Justice. Defendants established and have implanted rules, customs, and procedures that intentionally deprive inmates such as Swift of critically necessary medical care. Because of Defendants' deprivation of the rights, privileges, or immunities secured by Constitution and laws of the United States to Swift, Swift's condition continued to deteriorate.

4.3 Swift again presented himself to sick call at 7:00 a.m. on May 3, 1992 and pleaded for the basic medical care which the customs, usages, and policies of the State of Texas and the Texas Department of Criminal Justice denied him. However, Plaintiff Swift was again refused necessary medical care, despite his increasingly critical medical condition, and he was returned to his cell once again. By 7:30 a.m. on or about May 3, 1992, the pain and symptoms of Plaintiff Swift's rapidly

deteriorating physical condition so worsened that he was removed from his cell to the infirmary at Ramsey I Unit by stretcher.

4.3 Following the guidelines, rules, customs, procedures and regulations of the State of Texas and the Texas Department of Criminal Justice, the infirmary employees intentionally and deliberately refused to transfer Plaintiff Swift to obtain what became absolutely necessary medical examination and treatment. This custom, policy and procedure of denial of necessary medical care was established under color of the customs, usage, and practices of the State of Texas and the Texas Department of Criminal Justice, and these customs, policies, and procedures deprived Plaintiff Swift of the rights, privileges, and immunities guaranteed by the Constitution and laws of the United States.

4.4 Plaintiff Swift's condition continued to worsen until it finally appeared by 5:00 p.m. on May 3, 1992 that he was near death. The policy and procedures of the Texas Department of Criminal Justice and the State of Texas, deliberately established and implemented by James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, meant that despite the urgent need for immediate critical medical care, Swift's condition was allowed to deteriorate until he was finally life flighted to John Sealy Hospital in Galveston, Texas. Upon arrival in critical condition, Plaintiff Swift was provided the medical care which had been so callously and completely denied him for two days under the color of the statutes, customs, policies, and procedures of the Texas Department of Criminal Justice and the State of Texas. By that time, however, the ruptured abdominal

aortic aneurysm which could have been repaired in time had led to spinal cord damage which permanently crippled Swift.

4.5 Due to the deliberate indifference to the serious medical needs of Swift under the custom, policy, and procedures of the State of Texas and the Texas Department of Criminal Justice, Swift is now confined to a wheelchair for the rest of his life. In addition, Swift continues to suffer from a neurogenic bowel and bladder condition and severe mental and physical pain and torment for the rest of his natural life.

4.6 Defendants may have had the right to confine Swift to the prisons of Texas, but Defendants did not have the right through their policies, procedures, and customs, to confine Swift to a wheelchair for the rest of his life. Due to the deliberate indifference to the serious medical needs of Swift by Defendants, a natural byproduct of the rules, customs, procedures and regulations of Defendants, Plaintiff Swift has been robbed of all that he might ever hope to return to after his life in the care and custody of Defendants.

V.

DAMAGES

5.1 Due to the deliberate and intentional implementation of policies and procedures whereby inmates such as Swift are denied basic necessary medical aid, Swift will be forced to serve his time in the prisons of the State of Texas and thereafter in a wheelchair. Swift has been robbed of his ability to earn a living after he satisfies the requirements of the State of Texas, he has been forced to endure unimaginable pain and metal anguish, and he will continue to require expensive

and painful medical care for the rest of his now-shortened life. For all these damages and more, Plaintiff Swift now makes claim in this Court.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff HAROLD J. SWIFT prays that Defendants be cited to appear and answer herein, and that upon final trial and hearing hereof, Plaintiff recover his damages pursuant to 42 U.S.C. Section 1983, as well as such other claims allowed to him, and for such other and further relief, general and special, legal and equitable, to which he may show himself justly entitled.

Respectfully submitted,

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_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL NO. G-93-220
	§	
TEXAS DEPARTMENT	§	
OF CRIMINAL JUSTICE -	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

ORDER OF ADOPTION

Before the Court is the Report and Recommendation of the United States Magistrate Judge dated November 14, 1994, to which Plaintiff has filed objections. This Court has given this matter the de novo review contemplated by 28 U.S.C. § 636(b)(1)(C) and finds the Report and Recommendation of the Magistrate Judge to be a well reasoned analysis of why this unfortunate occurrence cannot give rise to a constitutionally cognizable cause of action. Plaintiff's objections are without merit and the Report and Recommendation of the Magistrate Judge is hereby **ADOPTED** in its entirety.

For the foregoing reasons set forth in the Report and Recommendation of the Magistrate Judge it is the **ORDER** of this Court that Plaintiff's complaint is **DISMISSED** in its entirety.

DONE at Galveston, Texas, this _____ day of _____ _____, 1994.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL ACTION
TEXAS DEPARTMENT OF	§	NO. G-93-220
CRIMINAL JUSTICE-	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

REPORT AND RECOMMENDATION

Before the Court for its Report and recommendation is Defendants' Motion to Dismiss. Plaintiff has filed a response to the motion, and this matter is ripe for the Court's consideration. Having given this matter thorough review, the Court submits the following report and recommendation to the District Court.

Relevant Background

On May 3, 1993, Plaintiff brought this action against Defendants the Texas Department of Criminal Justice - Institutional Division, hereinafter "TDCJ-ID"; the State of Texas; and James A. Lynaugh, Executive Director of the TDCJ. Plaintiff alleges that he was subjected to deliberate indifference to his serious medical needs through the action or inaction of the agents, employees and servants of Defendants in carrying out the policies, procedures, and customs established by Defendants.

The facts are fairly simple. On May 2, 1992, Plaintiff presented to the Ramsey I unit infirmary at 7:30 a.m. and sought treatment for severe stomach and back pains he had begun to experience a day earlier. According to Plaintiff, he was returned to his cell without receiving a "reasonable examination", which, he concludes, constituted deliberate indifference to his serious medical needs. The next day at 7:00 a.m., Plaintiff once again reported to the infirmary and was once again returned to his cell without receiving the medical care he needed. His condition so worsened in the ensuing half hour that at 7:30 a.m. he was taken to the infirmary on a stretcher. Plaintiff alleges that he was further subjected to deliberate indifference to his serious medical needs because it was not until 5:00 p.m. that same day that he was transferred, by life-flight, to John Sealy Hospital where he arrived in critical condition. At the hospital, Plaintiff was provided the necessary medical care, but by this time the ruptured abdominal aneurysm had damaged his spinal cord, leaving Plaintiff permanently crippled and confined to a wheelchair. Plaintiff also continues to suffer from a neurogenic bowel and bladder condition as well as severe mental and physical pain.

Plaintiff avers that while Defendants may have had the right to confine him to a Texas prison, they did not have the right, through their customs, policies, and procedures, to confine him to a wheelchair for the rest of his life.

Analysis

Defendants have filed a Motion to Dismiss pursuant to Rule 12(b) (1) and Rule 12(b) (6) of the Federal Rules of Civil Procedure. In the motion, Defendants assert their entitlement to Eleventh Amendment immunity, sovereign immunity, and

qualified immunity, as well as the inapplicability of respondeat superior and negligence principles to 42 U.S.C. § 1983 actions.

A review of the complaint reveals that Plaintiff has sued two state entities and has phrased much of the pleading in negligence terms. In the Response to the Motion to Dismiss, Plaintiff essentially concedes the legitimacy of Defendants' arguments in support of dismissal with the exception of the claims stated against Defendant Lynaugh in his individual capacity stemming from his direct involvement in establishing, implementing, and enforcing policies for the evaluation of inmates' medical needs that resulted in the deprivation of necessary medical care. Therefore, this Court **RECOMMENDS** that the claims for damages against the state entities, TDCJ-ID and the State of Texas, as well as any official capacity claims against Defendant Lynaugh be **DISMISSED** under rule 12(b) (1) for lack of jurisdiction as they are barred by the Eleventh Amendment, absent congressional abrogation or waiver by the state. Kentucky v. Graham, 473 U.S. 159, 169 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Hirtz v. State of Texas, 974 F.2d 663 (5th Cir. 1992).

Plaintiff's complaint is not at all specific about the nature of the policies or customs emanating directly from Defendant Lynaugh that led to the alleged deprivation of his right to be free from deliberate indifference to his serious medical needs.[1] Specificity in pleading is of the essence in an

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[1] In the Response to the Motion to Dismiss, Plaintiff alludes to Defendant Lynaugh's direct involvement in establishing policies, etc., for evaluating inmates' medical needs that deprive inmates such as Plaintiff of "necessary medical care". This is not the correct standard under the Eighth

action filed under 42 U.S.C. § 1983 where an individual defendant has asserted qualified immunity. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985); Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994); Jordan by Jordan v. Jackson, 15 F.3d 333, 339 n.5 (4th Cir. 1994). An individual defendant is entitled to specific recitals demonstrating his personal involvement in the alleged wrongs perpetrated against the plaintiff. Lynch v. Cannatella, 810 F.2d 1363, 1377 (5th Cir. 1987). Plaintiff's complaint is laden with the sort of conclusory allegations that are anathema in section 1983 actions. See Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986). For this reason, this Court must **RECOMMEND** that Defendants' Motion to Dismiss be **GRANTED** under Rule 12(b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Although respondeat superior does not apply in actions filed pursuant to 42 U.S.C. § 1983, Monell v. New York Dep't of Soc. Servs., 436 U.S.658, 693 (1978), one approach to holding an individual in Defendant Lynaugh's position liable is through the concept of supervisory liability. Supervisory liability exists even without overt personal participation in the offensive act if the supervisory official implements a policy so deficient that the policy "itself is a repudiation of constitutional right" and is "the moving force of the constitutional violation". Grandstaff v. Borger, 767 F.2d 161, 169, 170 (5th Cir. 1985), reh'g en banc denied, 779 F.2d 1129 (5th Cir. 1986), cert. denied, 480 U.S. 916 (1987), as quoted in Thompkins v. Belt, 828 F.2d 298, 304 (5h Cir. 1987). A supervisory official such as Defendant Lynaugh cannot be held liable unless he knew the prison's medical care system was so deficient as to expose

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Amendment.

prisoners to deliberate indifference to their serious medical needs, he failed to properly correct the deficiencies, and his action or inaction caused Plaintiff's injuries. Thompkins v. Belt, at id. It is axiomatic that a constitutionally deficient policy cannot be inferred from a single wrongful act. Id. None of the above elements has been pleaded in this case, certainly not with the specificity required in a case of this nature, which provides another reason for this Court to **RECOMMEND** that this action be **DISMISSED** for failure to state a claim under Rule 12(b) (6) of the Federal Rules of Civil Procedure.

This Court also agrees with Defendants that despite peppering the allegations in the complaint with the buzzwords of "deliberate indifference", the complaint, when reduced to its simplest terms, alleges nothing more than negligence, which is not actionable under 42 U.S.C. § 1983. Daniels v. Williams, 474 U.S. 327 (1986). Medical malpractice is not alchemized into a constitutional claim simply because Plaintiff happens to be a prisoner. Estelle v. Gamble, 429 U.S. 97 (1976). It is also axiomatic that evidence of examination and treatment negate deliberate indifference. Bass v. Sullivan, 550 F.2d 229 (5th Cir.), cert. denied, 434 U.S. 864 (1977). Plaintiff's own pleading acknowledges that he was seen by prison infirmary personnel and ultimately transported to John Sealy Hospital. While Plaintiff might disagree with the course of treatment he received, such disagreement, even where warranted, as in this extremely unfortunate case, does not amount to a constitutional claim. Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990). This kind of pleading deficiency is yet another reason this Court **RECOMMENDS** Defendants' Motion to Dismiss be **GRANTED**.

In passing, this Court feels compelled to note that at no

time during the pendency of the motion to dismiss did Plaintiff move for leave to amend to name more culpable defendants or to cure the deficiencies in pleading.

The Clerk shall send copies of this Report and Recommendation to the parties who have ten (10) days from receipt thereof to file written objections thereto, pursuant to General Order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

DONE at Galveston, Texas, this the 3rd day of November, 1994.

JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE